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Thirty-first session

SUMMARY RECORD OF THE 646th MEETING*

Held at Headquarters, New York,
on Friday, 12 June 1998 at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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* No summary record was issued for the 645th meeting.

This record is subject to correction.

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

98-80797 (E)

The meeting was called to order at 10.20 a.m.

ADOPTION OF THE REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS THIRTY-FIRST SESSION (A/CN.9/XXXI/CRP.1 and Add.1-19)

1. The CHAIRMAN invited the Commission to consider the draft report of the United Nations Commission on International Trade Law on the work of its thirty-first session, contained in documents A/CN.9/XXXI/CRP.1 and Add.1 to Add.19.

2. Mr. RESTREPO-URIBE (Colombia), Rapporteur, introducing the draft report, said that it summed up the essence of the Commission's discussion of the topics on its agenda at the current session. As a provisional document, it was open to correction and amendment.

Document A/CN.9/XXXI/CRP.1

3. Mr. ESTRELLA FARIA (International Trade Law Branch) drew attention to paragraph 4 and noted that the terms of office of Spain and Uganda would expire in 2004, not in 1998. The second sentence of note 1 should be corrected to read "Of the current membership, 17 were elected by the General Assembly at its forty-ninth session on 28 November 1994 (decision 49/315) and 19 were elected by the Assembly at its fifty-second session on 24 November 1997 (decision 52/314)."

4. Mr. RENGER (Germany), referring to paragraphs 4 and 5, noted that since the membership of Uruguay alternated annually with that of Argentina, it would be incorrect to state that Uruguay had not been represented at the session.

5. Document A/CN.9/XXXI/CRP.1, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.1

6. Mr. LAMBERTZ (Observer for Sweden) said that paragraph 7 might appear misleading. When considering the chapters of the draft legislative guide, the Commission had requested certain changes in the structure of the guide, so that it would be presented in the form of concise legislative principles. It might therefore be advisable to include, in paragraph 7, a reference to the discussion reported in document A/CN.9/XXXI/CRP.1/Add.9. He suggested amending the first sentence to read: "While requesting some adjustments concerning the form of the recommendations, as specified in paragraph 9, the Commission noted and generally approved the proposed structure of the draft legislative guide ...".

7. Ms. GUREYEVA (Russian Federation) said that paragraph 9 was not entirely accurate: the Commission had not discussed the "difficulty" of formulating model legislative provisions, but rather had drawn attention to the undesirability of doing so, because of the political issues involved.

8. As to the structure and appearance of the draft guide, she believed that setting out the text of the recommendations separately from the commentary, with each recommendation followed by the relevant portion of the commentary, would make the guide easier to use.

9. Mr. HERRMANN (Secretary of the Commission) recalled that a number of delegations had referred to the difficulty of formulating model legislative provisions. He suggested that the first sentence of paragraph 9 should be revised to refer to "the potential difficulty and undesirability of formulating model legislative provisions".

10. The suggestion by the representative of the Russian Federation concerning the format of the guide had not been made during the session, and thus could not be taken up at the present stage. However, it would be borne in mind by the secretariat when it prepared future chapters of the draft guide.

11. Document A/CN.9/XXXI/CRP.1/Add.1, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.2

12. Mr. WALLACE (United States of America), referring to paragraph 8, suggested that a definition of the project developer or sponsor should be added in order to reflect the discussion in the Commission. Paragraph 11 should refer to "limited recourse" as well as to "non-recourse" finance. Concerning paragraph 14, he recalled that the Commission had emphasized the importance of project companies being able to pledge shares as collateral. Lastly, in paragraph 26 the adjective "new" should be deleted, as the intended contradistinction was not to old infrastructure, but rather to the provision of services.

13. Document A/CN.9/XXXI/CRP.1/Add.2, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.3

14. Mr. WALLACE (United States of America) drew attention to the second sentence of paragraph 6 and suggested adding the phrase "but some States observed that that might not be a wise practice" after the words "infrastructure projects". He also suggested that the phrase "and foreign exchange rates, or to repayment in foreign exchange at the proper rate" should be added to the end of paragraph 7.

15. Mr. RENGER (Germany) said he did not feel comfortable with the amendment to paragraph 6 proposed by the representative of the United States of America. It would look as if the Commission was attempting to tell sovereign States how to legislate.

16. Ms. GUREYEVA (Russian Federation) suggested amending paragraph 4 to include a reference not only to "constitutional restrictions" but also to "other legislative provisions". In the Russian Federation, the restrictions might be imposed by subordinate legislation.

17. Mr. ESTRELLA FARIA (International Trade Law Branch) pointed out that the restrictions mentioned in paragraph 4 did include "restrictions established by legislation and regulations subordinate to the constitution".

18. Mr. WALLACE (United States of America) explained that his proposed amendment to paragraph 6 did not imply any judgement on the part of the

Commission. The observation in question had in fact been made by some States represented in the Commission, which was, after all, engaged in making recommendations for legislative reform.

19. The CHAIRMAN suggested, as an alternative amendment to paragraph 6, "a view was expressed that that might not be a wise practice".

20. Mr. WALLACE (United States of America) suggested several further amendments. The section on rules and procedures on expropriation (paras. 19 and 20) could include the following statement: "A view was expressed that the term 'expropriation' was not the appropriate term to describe the Government procedure". Concerning paragraph 21, he recalled that it had been proposed to include as a footnote a list of the documentation on intellectual property. Paragraph 24 should refer to paragraph 40, not paragraph 44, of document A/CN.9/444/Add.5. In that connection, it had been suggested that the reference to the pledging of shares should be placed first.

21. Mr. LAMBERTZ (Observer for Sweden) said the reference in paragraph 32 to legislative recommendation (12) would be better placed at the beginning of the section on other relevant areas of legislation (para. 14).

22. Mr. HERRMANN (Secretary of the Commission), replying to the representative of the United States of America, said that the term "expropriation" was correct; the issue was one of terminology. He proposed adding the phrase "in some countries".

23. Mr. OLIVENCIA RUIZ (Spain) endorsed that proposal.

24. Mr. WALLACE (United States of America) suggested that paragraph 40 should mention, in addition to the International Centre for the Settlement of Investment Disputes, other arbitral bodies such as the International Chamber of Commerce.

25. Mr. LEÓN ROBAYO (Colombia) pointed out that other dispute settlement mechanisms besides conciliation and mediation had been mentioned during the discussion. He therefore suggested adding the words "inter alia" or "for example" to paragraph 41.

26. Document A/CN.9/XXXI/CRP.1/Add.3, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.4

27. Mr. WALLACE (United States of America), referring to paragraphs 6 and 7, said the Commission had concluded that Governments would have a strategic decision to make on sector structure, as a matter of policy or legislation. It had therefore decided that the substance of the commentary on sections A and B of chapter II should be kept separate from that on section C. He suggested that, instead of moving the substance of the discussion on those two sections to the introductory part of the guide, the introduction should contain a brief preliminary reference to them.

28. Ms. BRELIER (France) said she believed that the paragraphs in question accurately reflected the Commission's thinking.

29. Ms. SABO (Observer for Canada), supported by Mr. RENGER (Germany), said it had been the Commission's view that the substance of the discussion on sections A and B should be retained and presented in the introduction to the guide.

30. Ms. ALLEN (United Kingdom) shared the view of the United States representative: the Commission had agreed to present the discussion on sections A and B in an earlier part of the guide, although not necessarily in the introduction.

31. Mr. WALLACE (United States of America) said that he could accept the existing text of paragraphs 6 and 7.

32. Document A/CN.9/XXXI/CRP.1/Add.4 was adopted.

A/CN.9/XXXI/CRP.1/Add.5

33. Mr. WALLACE (United States of America) said that the following sentence should be added to the end of paragraph 3: "However, other delegates stressed the need for competitive selection." In the first sentence of paragraph 9, the word "public" should be inserted before "interests", and the phrase "of the host Government" should be deleted. In addition, the first line of paragraph 13 should be amended to read: "Except for editorial and linguistic comments, and a discussion with respect to consumer protection ...".

34. Ms. BRELIER (France) said that paragraph 3 represented the heart of the debate which had taken place, and the amendment suggested by the representative of the United States of America was unacceptable because it altered the balance of the existing text.

35. Mr. WALLACE (United States of America) said that his delegation had no intention of reopening the debate, but simply wished to reflect what had taken place.

36. Mr. HERRMANN (Secretary of the Commission) said that it was not the purpose of the report to reflect individual views; he invited other delegations to express support for the proposed addition.

37. Ms. SABO (Observer for Canada) said that her delegation supported the proposed addition; it would increase clarity without altering the intention of the paragraph.

38. A/CN.9/XXXI/CRP.1/Add.5, as amended, was adopted.

A/CN.9/XXXI/CRP.1/Add.6

39. Mr. WALLACE (United States of America) said that in the last sentence of paragraph 8, the phrase "when expressing a preference for competitive procedures," should be inserted after "should be taken" and the phrase "other than the preferred procedure described therein" should be deleted.

40. Mr. KOVAR (United States of America) proposed that the following sentence should be added to paragraph 20: "It was also observed that the text should reflect that an environmental impact assessment should ordinarily be carried out by the host Government as part of its feasibility studies."

41. A/CN.9/XXXI/CRP.1/Add.6, as amended, was adopted.

A/CN.9/XXXI/CRP.1/Add.7

42. Mr. WALLACE (United States of America) said that in paragraph 17, the following bracketed phrase should be inserted after the words "competitive selection procedures": "(although a view was expressed that this might be an unwise exception to competitive selection)".

43. Ms. BRELIER (France) said that her delegation could not accept that addition, as the text already presented a balanced and faithful reflection of the discussion.

44. Ms. MUSOLINO (Australia), supported by Ms. SABO (Observer for Canada) said that since paragraph 17 dealt with exceptional circumstances, she did not see any reason for including the proposed wording in the paragraph.

45. The CHAIRMAN said that paragraph 17 would be retained as originally drafted.

46. Mr. WALLACE (United States of America) proposed that the following sentence should be added at the end of paragraph 18: "Questions, however, were raised as to the appropriateness of using the technique of private financing in cases of urgency." In paragraph 23, the first sentence should read: "The need to protect the confidentiality of privileged and proprietary information, in paragraphs 95 and 96, was noted."

47. Mr. RENGER (Germany), supported by Ms. BRELIER (France), said that if that proposal was accepted, the second sentence would also need to be adjusted to maintain balance.

48. Mr. ZANKER (Australia) proposed that the beginning of the second sentence could be amended to read: "It was then suggested that there should be a discussion ...".

49. Mr. LAMBERTZ (Observer for Sweden) said that his delegation supported the proposed change to paragraph 23, since it better reflected the discussion which had taken place. He suggested that the following sentence should be added to the end of paragraph 22: "A view was expressed that recommendations on unsolicited proposals were in fact not legislative recommendations and should therefore be kept only in the notes."

50. Mr. CHOUKRI (Observer for Morocco) said that his delegation would prefer the stronger term "proposes", rather than "noted", in paragraph 23.

51. Mr. LIU Yang (China) said that in the draft report the secretariat had reflected the general lines of the discussion. The Commission must bear in mind that the report could not reflect only one delegation's opinion.

52. The CHAIRMAN said that, at the same time, all views should be expressed.

53. A/CN.9/XXXI/CRP.1/Add.7, as amended, was adopted.

A/CN.9/XXXI/CRP.1/Add.8

54. Mr. WALLACE (United States of America) suggested that paragraph 20 should be amended to read: "It was suggested that there should be inserted at the beginning of recommendation 9 the words 'except for assignment as security to lenders' and that paragraph 35 should be aligned to reflect legislative recommendation (9)."

55. He further suggested that the following sentence should be added at the end of paragraph 26: "It was suggested that reference should be made to the possibility of the project agreements containing provisions enabling a project company to sell out to the host Government, and for the host Government to buy out the project company."

56. Mr. MAZZONI (Italy), supported by Ms. BRELIER (France), said that, in order for a position to be reflected in a report, the Commission must first have held a substantive discussion on it. Moreover, a position expressed by an individual delegation should receive a certain amount of support from other delegations. If the Commission agreed to include in its reports any statement made by one delegation that had not been opposed by other delegations, its reports would be extremely cumbersome. His delegation was opposed to the amendments proposed by the representative of the United States of America.

57. Mr. BURMAN (United States of America) said that the fact that the position of just one delegation was being expressed had never been a reason for not including it in the Commission's reports. If that practice was not followed, a delegation would have to seek the support of other delegations in order to have its opinion reflected in the Commission's report. If some delegations were in favour of changing the Commission's working methods, perhaps the Commission could take up the matter at its next session.

58. Mr. HERRMANN (Secretary of the Commission) said that delegations should be aware that not every suggestion or view could be included in the Commission's report, since that would overburden the report. Several years ago, there had been some talk in the Commission about a "five-chips" theory according to which each delegation would be able to propose five changes to the Commission's report; perhaps that would be a more balanced system for amending draft reports.

59. Ms. SABO (Observer for Canada) said that her delegation endorsed the statement made by the Secretary of the Commission, since the secretariat was more likely to have a broader view of the discussions held and conclusions reached at a given session.

60. Mr. MAZZONI (Italy) said that it had been the practice of the Commission that, if one State expressed its view very strongly, that view would be reflected in the Commission's report. The mere fact that a delegation had expressed a view to which no objections had been raised was not enough to justify its inclusion in the Commission's report; the delegation in question was obliged to stress the particular importance of that view.

61. Ms. GUILLÉN (Observer for Venezuela) said that the Commission might wish to consider including provisions that gave the project company the authority and/or possibility to sell, entirely or in part, shares in the company to the host country.

62. Document A/CN.9/XXXI/CRP.1/Add.8, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.9

63. Mr. LAMBERTZ (Observer for Sweden) proposed that the phrase ", thereby reducing the number of recommendations," should be added after the words "concise legislative principles" in paragraph 3.

64. Ms. ALLEN (United Kingdom) proposed the addition of the following sentence at the end of paragraph 5: "The Commission agreed that the possible need for a working group would be considered again at the next session."

65. Document A/CN.9/XXXI/CRP.1/Add.9, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.10

66. Mr. BURMAN (United States of America) proposed that the first sentence of paragraph 5 should be amended to read: "A widely expressed view was that it would be premature to undertake the preparation of the suggested convention, although the subject was introduced only as an information item, since the proposal had not been distributed." In the penultimate sentence of paragraph 5, the words "at a future session" should be amended to read "informally at the next session".

67. Ms. ALLEN (United Kingdom), supported by Mr. RENGER (Germany), Ms. BRELIER (France), Mr. LEÓN ROBAYO (Colombia) and Mr. MARADIAGA (Honduras), said that, while some delegations had not seen working paper A/CN.9/WG.IV/WP.77, the Commission had reached the clear decision that the Working Group should continue its work and should not consider the working paper. For that reason, the amendments that had been proposed by the representative of the United States of America were unacceptable.

68. Ms. SABO (Observer for Canada), supported by Mr. MAZZONI (Italy), said that, while delegations had not received the United States proposal contained in working paper A/CN.9/WG.IV/WP.77, they did have the report of the Working Group, which reflected a discussion of a proposal on the drafting of a convention. At the close of the discussion, it had seemed very clear that the Commission was confirming an earlier decision of the Working Group that, at the current stage, it was not advisable to undertake a convention. It had also seemed clear that

the Working Group would have the option of considering the United States proposal at a later date.

69. Mr. BURMAN (United States of America) said that, while paragraph 4 stated that "a specific proposal for the preparation of a convention had been received", that proposal had not been circulated among delegations. A reading of paragraphs 4 and 5 might lead to the conclusion that the first sentence of paragraph 5 was a decision based on the consideration of a specific proposal; that had not occurred. In its very brief presentation of the substance of the proposal, his delegation had stated that its presentation was for information only, since delegations had not yet received the proposal.

70. Mr. HERRMANN (Secretary of the Commission) agreed with the representative of the United States that the first sentence of paragraph 4 might be misleading. However, he could not accept the view that there had not been a discussion on the substance of the proposal. At the beginning of the discussion, there had been an oblique reference to a proposal, and he had suggested that the Chairman should invite the representative of the United States to give a short summary of the proposal and his reasons for making it; that would enable the Commission to hold an informed discussion and take a decision on the proposal. The representative of the United States had briefly presented his delegation's proposal, and the Commission had discussed it with a view to deciding whether or not the Working Group should consider it. At the end of the discussion, the representative of the United States had indicated that the proposal did not have to be taken up by the Working Group but could be considered informally outside the Working Group and the Commission.

71. Ms. SABO (Observer for Canada) said that her delegation supported the comments made by the Secretary of the Commission. However, Canada also supported the point made by the representative of the United States that the first sentence of paragraph 4 would have to be amended slightly. In the penultimate sentence of paragraph 5, her delegation had understood "at a future session" to mean "at a future session of the Commission".

72. Mr. ZANKER (Australia) said that his delegation wished to associate itself with the statement made by the Secretary of the Commission. Perhaps the question of drafting a convention could be considered informally at the next session. The United States proposal was far more than a simple proposal on legal rules relating to electronic commerce and required careful consideration. He proposed that the text of paragraphs 4 and 5 should remain unchanged.

73. Mr. RENGER (Germany) proposed that the phrase ", notwithstanding the views of some delegations that such a provision was not necessary" should be added at the end of the first sentence of paragraph 12.

74. Document A/CN.9/XXXI/CRP.1/Add.10, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.11

75. Mr. BURMAN (United States of America) referred to the terms "conflict-of-laws" and "private international law", used synonymously in paragraphs 2 and 4, respectively. He suggested that the secretariat should reconsider the

terminology, since "private international law" currently had a broader interpretation than "conflict-of-laws".

76. Mr. MARKUS (Observer for Switzerland) suggested that an additional sentence should be included at the end of paragraph 5, which would read: "With respect to the territorial scope of application, the remark was made that a solution by a choice of law system, similar to the one used in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), would rather not be appropriate."

77. Ms. BRELIER (France) proposed that the first sentence of paragraph 5 should be amended to read: "There was continuing discussion as to whether the scope of application should be limited to contractual receivables assigned for the purpose of obtaining financing." Such wording would reflect the fact that a decision had not been taken.

78. Mr. MAZZONI (Italy) supported the Swiss and French proposals.

79. Ms. SABO (Observer for Canada) said that she agreed in substance with the French proposal, but recalled that there had been general agreement that the scope of application was too wide. No decision had been taken to instruct the Working Group that the scope should be limited to contractual matters in the convention.

80. Ms. GUILLEN (Observer for Venezuela) pointed out the need for clarification in the drafting of the Spanish text, particularly in paragraphs 3, 5 and 10.

81. Mr. BURMAN (United States of America) agreed with the observer for Canada that no specific decision had been taken on narrowing the scope of application. In his opinion, the first sentence as it stood was correct.

82. Document A/CN.9/XXXI/CRP.1/Add.11, as amended, was adopted.

Documents A/CN.9/XXXI/CRP.1/Add.12 and Add.13

83. Documents A/CN.9/XXXI/CRP.1/Add.12 and Add.13 were adopted.

Document A/CN.9/XXXI/CRP.1/Add.14

84. Mr. LAMBERTZ (Observer for Sweden) said that it would be useful to amend paragraph 7 to reflect the comments made at an earlier meeting by the observer for the World Association of Former United Nations Interns and Fellows (WAFUNIP). The first sentence of paragraph 7 might be redrafted to read: "A concern was expressed that the majority of the participants in the internship programme of the secretariat, as well as the technical assistance programmes, were nationals of developed countries". In addition, the following sentence might be added to the end of the paragraph: "It was also suggested that extrabudgetary funding should be provided for carrying out training and technical assistance activities."

85. Ms. PANARELLO (World Association of Former United Nations Interns and Fellows) endorsed the comments made by the observer for Sweden.

86. Mr. HERRMANN (Secretary of the Commission) recalled that, following the statement by the observer for WAFUNIF at the earlier meeting, the secretariat had pointed out that it would be inaccurate to state that the majority of the Commission's technical assistance programmes targeted developed countries. While the Commission fully supported the aspirations and goals of WAFUNIF, for the sake of accuracy, it was incumbent on him to point out that those programmes were exclusively earmarked for developing countries and countries with transition economies. Likewise, it would be misleading simply to request extrabudgetary funding for training and assistance because the Commission already had a Trust Fund for that purpose.

87. Mr. KOVAR (United States of America) proposed that, in the second sentence of paragraph 7, the words "all States" should be replaced with "the Commission".

88. Mr. RENGER (Germany) said it had already been established that the Commission had no resources to fund interns and that Governments would therefore have to seek their own funding for interns.

89. Ms. GUREYEVA (Russian Federation) drew attention to a translation error in paragraph 7 of the Russian text.

90. Document A/CN.9/XXXI/CRP.1/Add.14 was adopted.

Document A/CN.9/XXXI/CRP.1/Add.15

91. Mr. HERRMANN (Secretary of the Commission) suggested that the first sentence of paragraph 2, should be revised to indicate that the Commission took note of the deposit of the instrument of accession by Croatia to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

92. Document A/CN.9/XXXI/CRP.1/Add.15, as revised, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.16

93. Document A/CN.9/XXXI/CRP.1/Add.16 was adopted.

Document A/CN.9/XXXI/CRP.1/Add.17

94. Ms. SABO (Observer for Canada), supported by Ms. GUREYEVA (Russian Federation) and Mr. CHOUKRI (Observer for Morocco), suggested that a paragraph should be added expressing the Commission's wish to have the proceedings of the special commemorative event and colloquium, held on 10 and 11 June 1998, respectively, published. The new paragraph might read: "The Commission expressed the wish that the secretariat would publish the proceedings of the New York Convention Day and Uniform Commercial Law Information Colloquium (UCLIC) as expeditiously as possible."

95. Mr. HERRMANN (Secretary of the Commission) agreed with the previous speakers on the desirability of documenting the proceedings of such events, but reminded the Commission that the secretariat lacked the necessary resources to publish many useful texts. He therefore urged the members of the Commission to

follow up their requests for publications with appropriate action in the Fi
Committee of the General Assembly.

96. Mr. SHER (International Association of Lawyers) suggested that it migh
worthwhile for the Commission to explore the possibility of involving
non-governmental organizations in the publication and distribution of docum
by the Internet.

97. Document A/CN.9/XXXI/CRP.1/Add.17, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.18

98. Mr. BURMAN (United States of America) proposed that the phrase ", alth
some aspects of liability rules might be involved" should be added to the f
sentence of paragraph 3.

99. Document A/CN.9/XXXI/CRP.1/Add.18, as amended, was adopted.

Document A/CN.9/XXXI/CRP.1/Add.19

100. Mr. HERRMANN (Secretary of the Commission), replying to a request for
clarification by Ms. GUREYEVA (Russian Federation), pointed out that the
sessions of working groups set out in paragraph 6 reflected the decisions t
on the conference schedule up to and including the Commission's thirty-seco
session, in 1999.

101. Mr. LIU Yang (China) requested that the title of the Working Group on
Electronic Commerce should be accurately reflected in paragraph 6 (b) of th
Chinese version.

102. Document A/CN.9/XXXI/CRP.1/Add.19, as amended, was adopted.

CLOSURE OF THE SESSION

103. After an exchange of courtesies, the CHAIRMAN declared the thirty-firs
session closed.

The meeting rose at 1.05 p.m.